

Cite as 2010 Ark. 329

SUPREME COURT OF ARKANSAS

No. 10-160

GARY ZOLLIECOFFER,
APPELLANT,

VS.

MIKE BEEBE, IN HIS OFFICIAL
CAPACITY AS GOVERNOR OF THE
STATE OF ARKANSAS, AND
VERONICA POST,

APPELLEE,

Opinion Delivered September 16, 2010

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
NO. CV-2009-3066-03,
HON. CHRISTOPHER CHARLES
PIAZZA, JUDGE,DISMISSED WITHOUT PREJUDICE.

RONALD L. SHEFFIELD, Associate Justice

Gary Zolliecoffer appeals from an order of the Pulaski County Circuit Court, dismissing his claim for writ of mandamus and for declaratory judgment against Governor Mike Beebe and transferring his claim for declaratory judgment against Altus Mayor Veronica Post to the Franklin County Circuit Court. Because the order on the motion to dismiss is not final under Ark. R. App. P.–Civ. 2(a)(1), this court lacks subject-matter jurisdiction to hear the appeal unless the circuit judge properly certified that there is no just reason for delay and expressly directed the entry of judgment. Ark. R. Civ. P. 54(b)(1); *see also Kowalski v. Rose Drugs of Dardanelle, Inc.*, 2009 Ark. 524, ___ S.W.3d ___. The issue of whether an order is final and subject to appeal is jurisdictional in nature, and this court will thus raise it sua sponte. *See, e.g., id.* Since the order in the instant appeal does not comply with Rule 54(b), we dismiss the appeal without prejudice.

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On November 7, 2006, the voters in Altus, Arkansas, went to the polls to elect their next mayor. The parties have stipulated that appellant Zollicoffer received 136 votes and appellee Post received 123. On November 9, 2006, Post filed a petition for writ of mandamus and a declaratory judgment action in the Franklin County Circuit Court in which she asserted that Zollicoffer was ineligible for public office because he was a convicted felon. The circuit judge found that Zollicoffer had pleaded guilty to burglary and grand larceny in 1965, when he was seventeen years old, and declared that he was ineligible to run as a candidate for mayor and that the Franklin County Election Commission (Commission) was prohibited from certifying any votes cast for him. Zollicoffer appealed, and this court reversed and dismissed, holding that the circuit court lacked subject-matter jurisdiction to consider a pre-election challenge filed after the election. *Zollicoffer v. Post*, 371 Ark. 263, 265 S.W.3d 114 (2007) (*Zollicoffer I*).

While the appeal was pending in *Zollicoffer I*, and within the time allowed by statute, the Commission certified the votes cast for Post, and she was subsequently commissioned by then-Governor Mike Huckabee and took the oath of office for mayor in January 2007. After the opinion was handed down in *Zollicoffer I*, Post filed a petition for writ of mandamus and an action for declaratory judgment against Zollicoffer and the Commission in Franklin County Circuit Court, seeking a declaration that the Commission was prohibited by statute from certifying the votes and prohibiting it from doing the same. The circuit judge held a hearing, after which he dismissed the petition for lack of subject-matter jurisdiction. The

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judge specifically found that based on the doctrine of law of the case, *Zollicoffer I* governed and provided that the court lacked jurisdiction to hear the petitions. This court affirmed. *Post v. Franklin County Bd. of Comm'rs*, 375 Ark. 345, 290 S.W.3d 595 (2009) (*Zollicoffer II*).

On April 29, 2009, after *Zollicoffer II* was decided, Zollicoffer filed the instant action in Pulaski County Circuit Court. He maintained that because there was no judgment of conviction entered in the 1965 matter, he was not a convicted felon and was not barred from seeking elected office. Zollicoffer asserted that he was “entitled to a declaration of his status, that he is not a convicted felon, and further to a Writ of Mandamus, directed that the Defendant Mike Beebe, as Governor of the State of Arkansas, issue the commission” to him as mayor of Altus. Post answered, and Governor Beebe filed a motion to dismiss, which Post joined. The circuit court heard only the motion to dismiss on September 1, 2009, and on November 12, 2009, entered an order on the motion, dismissing Governor Beebe and finding that it lacked jurisdiction to consider the declaratory action against Post and transferring it to the Franklin County Circuit Court.

Since this is a subsequent appeal, this court’s jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(7). However, this court lacks subject-matter jurisdiction because the circuit court’s order does not comply with Ark. R. Civ. P. 54(b).

Rule 54(b) governs the finality of orders in connection with judgments upon multiple claims or involving multiple parties and provides, in pertinent part:

(1) *Certification of Final Judgment.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party

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claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination, *supported by specific factual findings*, that there is no just reason for delay and upon an express direction for entry of judgment. . . .

Ark. R. Civ. P. 54(b)(1) (2010) (emphasis added). The order was not final in the instant case because the claims against one defendant, Governor Beebe, were dismissed, and the claims against another defendant, Post, were transferred. *See, e.g., Downen v. Redd*, 367 Ark. 551, 242 S.W.3d 273 (2006) (absent a proper Rule 54(b) certificate, an order that dismissed the claims as to two defendants and transferred the claim as to a third defendant to another circuit court was not final for purposes of Rule 54(b)).

We recognize that we recently handed down an opinion containing a footnote that may cause some confusion on this point. *See Farm Bureau v. Gadbury-Swift*, 2010 Ark. 6, n.2, ___ S.W.3d ___. However, the facts of *Farm Bureau* are distinguishable, and our decision in *Downen v. Redd* is on point and controls the instant appeal. 367 Ark. 551, 242 S.W.3d 273.

In *Downen*, the plaintiff sued Redd; the law firm of Smith, Maurras, Cohen, Redd & Horan, PLC (law firm); and McCormick Asphalt Paving & Excavation, Inc. (McCormick) in Sebastian County. The plaintiffs brought spoliation of evidence claims against all three defendants. The Sebastian County Circuit Court dismissed the spoliation of evidence claims against Redd and the law firm and transferred the claim against McCormick to Franklin County. The Franklin County Circuit Court thereafter dismissed the spoliation of evidence claim against McCormick, and the plaintiff appealed. McCormick argued to this court that the appeal was untimely because the plaintiff should have appealed from the Sebastian County

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order dismissing the claims against Redd and the law firm and transferring the claim against McCormick. This court rejected that argument, finding that the Sebastian County order was not final, and thus the plaintiff could not have appealed from that order absent a valid Rule 54(b) certificate. *Id.* at 553 n.3, 242 S.W.3d at 274 n.3.

In *Farm Bureau*, Farm Bureau brought a declaratory judgment action against Gadbury-Swift in Pulaski County, and, a few days later, Gadbury-Swift filed a breach of contract claim against Farm Bureau in Logan County. The Pulaski County Circuit Court then “declined” to hear the declaratory judgment claim and transferred it to Logan County under the doctrine of forum non conveniens. Farm Bureau appealed; this court heard the case on the merits and reversed. 2010 Ark. 6. Footnote two states as follows: “The order contained a Rule 54(b) certificate that it was a ‘final order.’ Because the order was manifestly a final order for purposes of Farm Bureau’s action in Pulaski County, the judge’s Rule 54(b) certificate was unnecessary.” 2010 Ark. 6 n.2.

The *Farm Bureau* footnote does not control in the instant matter because that case did not implicate Rule 54(b) in that it did not involve multiple claims or multiple parties. In other words, Farm Bureau brought one claim (for declaratory judgment) against one defendant (Gadbury-Swift). Thus, whether the order was final under Rule 54(b) was not at issue in *Farm Bureau*.

In this case, neither party appears to challenge the portion of the Pulaski County Circuit Judge’s order transferring the declaratory judgment action against Post to Franklin County. Rather, Zollicoffer objects to the dismissal, or, in his words the trial court’s “refusal

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to entertain” the declaratory judgment action. Since the declaratory judgment action against Post remains pending in Franklin County, the order appealed from is not final because all of the claims against all of the parties have not been adjudicated.

This court’s case law also makes clear that the findings supporting the court’s decision to certify a judgment under Rule 54(b) must be in the order itself. *See Smith v. Ark. Midstream Gas Servs. Corp.*, 2010 Ark. 32, ___ S.W.3d ___; *The Ralph Loyd Martin Revocable Trust v. Ark. Midstream Servs. Corp.*, 2009 Ark. 563, ___ S.W.3d ___; *Kowalski*, 2009 Ark. 524, ___ S.W.3d ___; and *Franklin v. Osca, Inc.*, 308 Ark. 409, 825 S.W.2d 812 (1992).

The 54(b) certificate included in the instant order states:

With respect to the issues determined by the above judgment, the court finds: That the issues regarding Plaintiff’s claim against Defendant Governor Mike Beebe are disposed of on grounds of subject matter jurisdiction particularly pertaining to the Separation of Powers Doctrine, and the ruling of this Court as to issues is final and concludes the matter as to Governor Beebe. That the remaining issue as to the Declaratory judgment sought as against Defendant Post be transferred and determined by the Circuit Court of Franklin County.

Upon the basis of the foregoing factual findings, the Court hereby certifies, in accordance with Rule 54(b)(1), Ark. R. Civ. P., that it has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the judgment shall be a final judgment for all purposes.

This certificate does not comply with the requirement that it state the specific factual findings to support a determination that there is no just reason for delay. As a result, this court lacks subject-matter jurisdiction, and the appeal must be dismissed without prejudice.

Dismissed without prejudice.

DANIELSON, J., not participating.